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Supreme Court, U.S.
FILED
MAR 14 1996
CLERK

No. 95-1063

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

WILLIAM B. BLOUNT,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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REPLY BRIEF IN SUPPORT OF THE PETITION

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Rule G-37 . . . . . *passim*

ARGUMENT

The essence of the position advanced by the SEC and the MSRB (together, "the government"), and adopted by the court of appeals, is that courts should not second-guess an administrative agency's determination of the need for prophylactic restrictions on political speech, even when those restrictions are based on content. That position rests on an interpretation of *FEC v. National Right to Work Committee ("NRWC")*, 459 U.S. 197 (1982), that is inconsistent not only with this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), but also with its decisions in such cases as *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994), and with the Eighth Circuit's recent decisions in *Carver v. Nixon*, 72 F.3d 633 (1995), *pet. for cert. pending*, No. 95-1258 (filed Feb. 7, 1996), and *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (1995).

1. The government does not dispute petitioner's assertion that Rule G-37's prohibition on the solicitation of political campaign contributions is a content-based regulation of speech.[1] Nor does it dispute that the Rule's ban on contributions is different not just "in degree," but "in kind," from a limit on the size of contributions. *Buckley*, 424 U.S. at 30.

Content-based restrictions are subject to "the most exacting scrutiny." *Turner Broadcasting*, 114 S. Ct. at 2459.

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[1] It prohibits a particular message—"give money"—and the prohibition is not "'justified without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). The prohibition is based on the fear that the message will be have a "persuasive effect" on the listener, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 n.7 (1992), prompting action that the government believes might be harmful.

"There must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal." *Id.* at 2478 (O'Connor, J., concurring in part, dissenting in part).[2] Under *Buckley*, the same standard of review applies to contribution limitations and, *a fortiori*, to contribution bans. 424 U.S. at 16-17, 25.

2. While the court of appeals purported to apply "strict scrutiny," Pet. App. A-13, its opinion essentially redefined the task that strict scrutiny requires. As the court noted, "the record contains only *allegations*," not evidence or findings, Pet. App. A-16, and the record did not even contain *allegations* that *de minimis* contributions or *solicitations* had ever presented a problem. The court nevertheless upheld the contribution and solicitation bans, based on this Court's statement in *FEC v. NRWC* that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." 459 U.S. at 210, *quoted at* Pet. App. A-16. *See also* MSRB Opp. 20; SEC Opp. 15.

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[2] The speech at issue here does not fit into any of the limited categories of content-based restrictions that have been upheld. *See Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment). It encourages entirely lawful activity in an arena in which the First Amendment "'has its fullest and most urgent application.'" *Buckley*, 424 U.S. at 15 (citation omitted). In this context, there are compelling reasons for the Court to adopt Justice Kennedy's position in *Simon & Schuster* that "borrowing the compelling interest and narrow tailoring analysis is ill-advised when all that is at issue is a content-based restriction." 502 U.S. at 124.

The court of appeals and the government have misconstrued *NRWC*. The quoted statement was uttered in the limited context of "a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 459 U.S. at 209-10. Congress had made a "careful legislative adjustment of the federal electoral laws" over time—a "'cautious advance, step by step'"—that the Court felt warranted a degree of deference. *Id.* at 209 (citation omitted). But the Court made clear three years later that its reluctance to engage in "quibbling over fine-tuning of prophylactic limitations" did not signal that it would defer to legislative judgments that involved "wholesale restriction of clearly protected conduct." *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985). "[W]hen the First Amendment is involved," the Court emphasized, "our standard of review is 'rigorous.'" *Id.* (quoting *Buckley*, 424 U.S. at 29).

NRWC does not mean that courts must defer to legislative, much less administrative, assessments of the need for prophylactic rules that restrict speech on the basis of its content. To the contrary, the Court has always insisted that "[b]road prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). And the Court has not hesitated to set aside even acts of Congress that seek to impose restrictions on speech—even non-content-based restrictions—in the absence of record or legislative findings that the restrictions are necessary.

Thus, in *First National Bank of Boston v. Bellotti*, the Court struck down a law that prohibited banks and business corporations from making contributions or expenditures for the purpose of influencing the vote on any referendum, because the legislation was not "supported by *record or*

legislative findings that corporate advocacy threatened *imminently* to undermine democratic processes." 435 U.S. at 789 (emphasis added). Likewise, in *Turner Broadcasting*, the plurality concluded that Congress's "must-carry" legislation could not be sustained even under *intermediate* scrutiny without (1) an "elaboration . . . of the predictive or historical *evidence* upon which Congress relied," (2) "*findings* concerning the actual effects of must-carry on the speech of cable operators and cable programmers," and (3) "judicial *findings* concerning the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." 114 S. Ct. at 2472 (emphasis added, citation omitted). The court of appeals' approach, based on a misreading of *NRWC*, cannot be squared with *Bellotti* or *Turner*—or, for that matter, with the case upon which the government so heavily relies, *Buckley*. *See* Pet. 11-13.

To defer to the administrative determination of need in this case is to rob the notion of strict scrutiny of all meaningful content. The agencies proceeded without any evidence or findings—indeed, without even any allegations that small contributions or solicitations had ever posed a problem. And far from proceeding in a "cautious advance, step by step," *NRWC*, 459 U.S. at 209, the agencies in this case engaged in a headlong rush in the first instance to prohibit everything they imagined might ever be a problem.

Neither the MSRB nor the SEC can claim any expertise that warrants particular deference to this judgment: neither had any prior experience regulating election campaign activity. And neither evidenced any appreciation of the impact of their rule on the right to free speech. Indeed, the MSRB, which proposed the solicitation ban, thought that the

First Amendment was inapplicable to the rulemaking process. Although it tells this Court that "[i]n drafting and approving Rule G-37, the MSRB and SEC were sensitive to First Amendment concerns," MSRB Opp. 7, the fact is that the MSRB took the position at all times (until now) that it "is not a governmental actor" and that its rules "are not subject to constitutional constraints or review." JA 671. In short, the careful constitutional judgments that should have been made in the first instance by the MSRB were not made by the MSRB at all. Deference to administrative judgment in this case is deference to a phantom.[3]

3. The decision of the court of appeals in this case conflicts with two recent decisions of the United States Court of Appeals for the Eighth Circuit. In *Carver v. Nixon*, 72 F.3d 633 (1995), *pet. for cert. pending*, No. 95-1258 (filed Feb. 7. 1996), the court of appeals invalidated a state statute that limited individual campaign contributions to $100 to $300 per candidate. The court explained that the state had "made no showing as to why it was necessary to adopt" limits that differed not only "in degree", but "in kind," from the limits approved in *Buckley*. *Id.* at 644, 641. If, of course, a $300 contribution limit differs not only in degree, but in kind, from the limits in *Buckley*, so much more is that true of the flat-out prohibitions on certain contributions and solicitations in this case. Thus, in a companion case to *Carver*, the Eighth Circuit noted that "a ban on campaign contributions by organizations would not survive constitutional scrutiny."

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[3] The SEC acknowledged that it was bound by the First Amendment, but it never recognized that the solicitation ban, which it intended as a loophole-closing device, in fact transformed the rule into a content-based regulation of speech. *See* Pet. App. B-38 n. 68.

Shrink Missouri Gov't PAC v. Maupin, 71 F.3d 1422, 1425 (8th Cir. 1995).[4]

In *Shrink*, the court also considered a "spend-down" provision requiring a candidate to return or forfeit unspent contributions. The court invalidated that provision because it was based on an "unwarranted assumption about the intention of campaign contributors"—that contributions that could be kept for future campaigns "must constitute an impermissible attempt at improper quid pro quo influence." 71 F.3d at 1427-28. Rule G-37(b)'s prohibition on contributions to candidates for whom the contributor is not entitled to vote is based on an equally "unwarranted assumption"—that such contributions are "motivated by an improper attempt to influence municipal officials." Pet. App. B-53. It is impossible to reconcile the reasoning and results in *Carver* and *Shrink* with the reasoning and result in this case.

4. The government attempts to minimize the significance of the court of appeals' decision by noting that federal government employees and federal government contractors are also subject to restrictions on their political activity. But it is well-established that "the government has an interest in regulating the conduct and 'the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973) (citation

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[4] The government's distinction that the *Carver* limitations applied to all citizens ignores the court of appeals' recognition that the rationale for Rule G-37 would apply to anyone who has an interest in legislative or regulatory activity. Pet. App. A-12.

omitted). And the federal government does not impose any restriction on its contractors that is analogous to Rule G-37's prohibition on the solicitation of lawful contributions from others. Federal contractors may not make contributions, and no person may solicit an unlawful contribution *from* a contractor. 2 U.S.C. § 441c(a); 11 C.F.R. § 115.2. But there is no restriction on a federal contractor's soliciting contributions from third parties entitled to make such contributions.[5] Rule G-37 is the only provision of federal law that prohibits a private citizen from soliciting a *lawful* campaign contribution.

5. The government attempts to suggest that Rule G-37 should be upheld because those subject to its terms are not left without ways of expressing their political views. SEC Opp. 16-18; MSRB Opp. 7-8, 19. Of course, Rule G-37(c) does not leave open any alternative channel for communication of the particular message at issue here—"give money." More fundamentally, while the availability of "ample alternative channels for communication" is a factor to consider in reviewing a content-neutral time, place or manner regulation, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), it cannot save a rule like Rule G-37. The issue with

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[5] And notwithstanding the restrictions on contractors themselves, federal contractors may still establish segregated funds for the purpose of solicitation and contribution, and employees, major shareholders and corporate officers of federal contractors may still exercise their own personal rights to contribute, solicit, or participate in the political process just as any other citizen. 2 U.S.C. § 441c(b); 11 C.F.R. §§ 115.3, 115.4 & 115.6. Rule G-37, which extends beyond the contracting business entities to dealer affiliates and to individual municipal securities professionals, goes much further.

such a rule is not whether it leaves some avenues of speech unaffected; the issue is whether the rule could have foreclosed fewer avenues of speech—whether there was a less restrictive alternative.[6]

6. The government likens the interest behind Rule G-37 to the interest that was implicated in *Buckley* and *NRWC*. But the interest here is far more limited, and that too calls the court of appeals' decision into question. The decisions in *Buckley* and *NRWC* rested on the compelling governmental interest in preventing corruption, and the appearance of corruption, in the federal electoral process. But the securities agencies that produced Rule G-37 are powerless to invoke an interest in protecting the *electoral* process from corruption.[7] Their interest is of necessity limited to the protection of the securities market. And the court of appeals defined the relevant interest even more narrowly—the protection of underwriters and *not* the protection of investors. Pet. App. A-14 to A-18, A-21.

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[6] The MSRB misstates the "least restrictive means" issue, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989), as whether disclosure and record-keeping *alone* would have been effective. MSRB Opp. 21. The issue is whether those requirements, combined with contribution limitations (or, if necessary, a contribution ban) would have been effective, without the additional content-based prohibition on solicitations.

[7] They are likewise powerless to invoke the *states'* interests as employer or contracting party. Any state that feels a need to restrict its employees or contractors can enact such restrictions. Rule G-37 is thus either a superfluous measure or a paternalistic attempt to protect state interests that states themselves feel is unnecessary or undesirable.

In the final analysis, the government's oppositions, like the court of appeals' opinion, fail altogether to explain how this limited interest, on this record, can sustain Rule G-37's drastic provisions. The MSRB argues that there is a risk that "government officials will choose dealers . . . for the *size* of [their] campaign contributions." MSRB Opp. 13 (emphasis added). But that risk, if real, can at most support a limit on the *size* of contributions. There has never been a suggestion that an issuer would be influenced by a mere $250.

The MSRB argues that dealers may be coerced to make or solicit contributions. *Id.* But there is no evidence that anyone has ever been coerced to make a contribution, much less to solicit one from someone else. And the fear that some dealer might be coerced someday to solicit a contribution cannot, in any event, justify a content-based restriction on the speech of a dealer who willingly seeks to exercise his First Amendment rights.

The oppositions of the MSRB and SEC to the petition are as vague and imprecise in their justification of this rule as were their explanations at the time of the rule's promulgation. Now as then, newspaper accounts substitute for evidence,[8] and speculation takes the place of findings.[9] Surely more is

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[8] *See, e.g.*, Pet. App. B-9 to B-12 (citing press stories); MSRB Opp. 5, 13 (same); SEC Opp. 4 (same).

[9] *See, e.g.*, Pet. App. B-8 ("Selection *may* be based on non-meritorious considerations"), B-28 to B-29 ("*If* underwriter selection is swayed by political contributions or influence, underwriters *may* be chosen based on" contributions), B-30 ("'pay to play' practices *may* damage" securities market), B-30 ("*If*

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required to support Rule G-37's drastic and unprecedented restraint on political speech.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9](...continued)
political influence is the determinative factor . . . , the underwriter selected *may* be less . . . competent"); MSRB Opp. 4 ("dealers *might* well be in a position to provide substantial sums of money"), 5 ("campaign contributions *could* influence" dealer choice); SEC Opp. 4 ("widespread *potential* for abuse), 6 ("Pay-to-play *may* result in business being awarded" based on contributions), 7 ("underwriter selected on the basis of political contributions . . . *may* fail to carry out its obligations").